IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 224.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT RADIO, INC., *Petitioners,*

v.

FRANKLIN S. POLLAK AND GUY MARTIN, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

MEMORANDUM BRIEF FOR THE RESPONDENTS.

No. 295

FRANKLIN S. POLLAK AND GUY MARTIN, *Petitioners,*

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, CAPITAL TRANSIT COMPANY, AND WASHINGTON TRANSIT RADIO, INC., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Franklin S. Pollak and Guy Martin, appellants below, and respondents in No. 224 and petitioners in No. ...., submit that the writ prayed for in No. 224 should be issued

for reasons set forth hereinafter and pray that if that writ is issued (but only in that event) a writ of certiorari be issued on their behalf in No. .... to review the judgment in these causes entered by the United States Court of Appeals for the District of Columbia Circuit on June 1, 1951 (R. 132).

OPINIONS BELOW.

The opinion and order of the Public Utilities Commission (R. 114-122) is reported in 81 P.U.R.N.S. 122. The opinion of the District Court (R. 2-3) dismissing the original petition of appeal from the order of the Public Utilities Commission is unreported. The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the District Court (R. 124-131) is published in the printed record at pp. 124-131.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1951. The jurisdiction of this Court is invoked in No. .... under Title 28, United States Code, Section 1254(1) and the District of Columbia Code, 1940, Title 43, Section 705.

STATEMENT OF THE CASE.

The principal facts of the case are set forth succinctly in the opinion of the court below (R. 124).

The judgment of the court below (R. 132) gave to these respondent-petitioners less than the full relief which they sought before the Public Utilities Commission. Before the Commission they sought an order totally prohibiting the broadcasts in question—words and music alike (Application for Reconsideration, —) (Tr. Doc. No. 48).[1] The opinion of the Court of Appeals stated:

[1] The Application for Reconsideration has not been printed but is part of the record in this Court. It was Item 48 of the proceedings before the Public Utilities Commission as certified by the

> "This decision applies to 'commercials' and to 'announcements'. We are not now called upon to decide whether occasional broadcasts of music alone would infringe constitutional rights. (R. 130)."

The judgment of the Court of Appeals remanded the cause to the District Court with directions to remand to the Commission for further proceedings in conformity with the opinion of the Court of Appeals. The judgment thus requires the Commission to prohibit only "commercials" and "announcements". It does not require the Commission to prohibit any other spoken parts of the broadcasts, if there are spoken parts not falling within the categories of "commercials" and "announcements" as those terms are used in the opinion; and it does not require the Commission to prohibit the musical portions of the broadcasts.[2]

QUESTIONS PRESENTED.

In the view of these respondents-petitioners, this case involves one ultimate question:

Commission to the District Court; was made part of the record in the Court of Appeals by an order of the District Court entered August 24, 1950; and is part of the original transcript of record in the Court of Appeals transmitted to this Court pursuant to an order of that court entered August 6, 1951. The District Court's order of August 24, 1950, and the stipulation of the same date on which it was based are themselves part of the record in this Court (Tr. 44, 47, 55); they define the portions of the proceedings before the Public Utilities Commission which are part of the record in this Court.

[2] The musical portions of the broadcasts are not covered by either the first or second sentence quoted above from the Court of Appeals' opinion. They are not "commercials" or "announcements", to which the Court of Appeals says its decision applies. Equally they are not "occasional broadcasts of music alone", the constitutional status of which the Court of Appeals says it is not called upon to determine: they are not "occasional" and they are not "alone". It seems clear, however, that the first sentence controls and that the musical portions of the broadcasts are not barred by the order below.

May the Public Utilities Commission of the District of Columbia approve and ratify a requirement of the monopoly transit company that all bus and streetcar passengers must, as a condition of riding, be subjected to the loudspeaker rendition of radio programs of one radio station which the transit company has, for a money consideration, contracted to impose on the riders?

This ultimate question turns, in our view, on the following primary questions, which we consider to be the questions presented in this case:

1. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their rights under the First Amendment to the United States Constitution by forcing on them speech which they do not wish to hear, by making it difficult or impossible for them to hear speech of others which they do wish to hear, by making it difficult or impossible for them to read printed words which they do wish to read, by making it difficult or impossible for them to speak to others as they choose, and by generally interfering with their freedom to listen or not to listen, and to read or not to read.

2. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their liberty in violation of the Fifth Amendment to the United States Constitution by depriving them of the free use of their faculties.

3. Whether these broadcasts, as alleged in the petition of appeal, deprive these respondents-petitioners and other objecting riders of their property in violation of the Fifth Amendment to the United States Constitution by depriving them of the use of their time and by endangering their health, for the private benefit of others and without compensation.

It is to be noted that these questions, as stated, do not even by implication distinguish between the portions of

the broadcasts which consist of words and the portions which consist of music, except at one point. The forcing upon objecting riders of speech which they do not wish to hear necessitates the use of words and cannot be done by music. But in every other aspect the questions presented, as stated above, are presented at least as fully by the music as they are by the words.

It may, however, be the law of this Court that, since the judgment of the Court of Appeals is limited to "commercials" and "announcements", the questions enumerated above are presented in No. 224 only in so far as they are raised by "commercials" and "announcements". If so—and in any event—the above enumerated questions, as raised by the *other* portions of the broadcasts, are presented by our cross petition for certiorari in No. —.

STATUTES INVOLVED.

The pertinent constitutional and statutory provisions are printed in the Appendix to the petition in No. 224.

REASONS FOR GRANTING THE WRITS.

In No. 224.

We believe that the decision below was correct in so far as it granted us the relief which we sought.

We believe also that the "questions presented", as stated by petitioners in No. 224, are not the questions actually presented—mainly because they are stated without mention of what we consider to be the crucial fact of the governmentally-conferred monopoly of Capital Transit Company and because, in our view, the court below did not rely on evidence outside the record in reaching its result. We believe further that the "reasons for granting the writ", as stated by petitioners in No. 224, are in general open to the same objections.

We do not, however, pursue these objections because in our view there are other—and important—reasons for granting the writ.

A. Freedom of Communication by Writing or Speech and Freedom of Reflection—Both of Which Are Impaired by Transit Radio Are Basic to the Functioning of Our Democracy.

The interest of the public, as well as of the speaker, in freedom of speech and the importance, in a democracy of freedom of communication and freedom of reflection are so apparent and have been so emphatically stated in opinions in this Court that elaboration is unnecessary. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402 (1950); *Martin* v. *Struthers*, 319 U. S. 141, 148 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Saia* v. *New York*, 334 U. S. 558 (1948).

Transit radio, within its sphere, violates these freedoms.

B. Forced Listening by a Captive Audience to Editorial Matter Selected by Private Individuals Involves Grave Dangers.

The dangers of requiring that any audience listen to opinions and exhortations, whether open or by implication, selected by a small group of men, to which no reply in the same medium can very effectively be made, are so vivid in the recollections of all of us as fully to justify the intervention of this Court to do all that the judicial power permits in the prevention of the intolerable situation to which such practices can lead.

Moreover, the broadcasts which have been made to the captive audience in the vehicles of Capital Transit Company illustrate here and now the reality of the dangers which experience elsewhere has warned of. In their most innocuous form the public service announcements have urged this audience to contribute to the Red Cross, the Community Chest and other charities. Even these announcements represent opinions on matters concerning which necessarily all men do not agree. But the tendency to present opinions of a plainly controversial character has proven irresistible. Some of these are in the record in

this case. Others, having occurred subsequent to the hearing before the Commission, are not. But this Court, we submit, may take notice of broadcasts known to the thousands of riders who were subjected to them.

The power over this captive audience has been used in the personal interest of Washington Transit Radio, Inc. and Capital Transit Company to influence public opinion on the merits of transit radio itself.

Subsequent to the hearing before the Public Utilities Commission there have been other broadcasts expressing, directly or by implication, views favorable to transit radio.

There have been also other broadcasts on other subjects which were plainly of a controversial character. For example on April 19, 1951, the address of General of the Army Douglas MacArthur to Congress was broadcast in full to the riding public as he was making it.

C. The Threatened Nationwide Expansion of the Transit Radio Enterprise Cannot Be Dealt With by an Opinion of the United States Court of Appeals for the District of Columbia Circuit and Justifies the Attention of This Court.

The transit radio system is in operation in some 19 cities of the United States. Headquarters of the system are maintained at Cincinnati, Ohio. There is a national agency which acts as sales representative for all cities. It is, as its proponents say, the only method by which radio can deliver a guaranteed audience.

Referring specifically to the petition to this Court in No. 224, the "national" or "parent" company of the system, Transit Radio, Inc. circulated under date of July 25, 1951, a statement containing the following:

> "We are now petitioning the Supreme Court for writ of certiorari, and it is expected that the court will either grant or deny this sometime in October. If granted, and the great majority of counsel is of the opinion that it will be, the case of Transit Radio versus several Washington attorneys should be heard during the fall term of the Supreme Court and a decision

might reasonably be expected sometime between February and June. This means, of course, that the expansion of Transit Radio into new cities, as well as revival in others, is out of the question until final action by the court and, the responsibility of supporting the legal costs falls upon the shoulders of Transit Radio, Inc. and its principal stations."

Representatives of the system have urged the Federal Communications Commission to encourage the development and expansion of transit radio as a means of advancing the FM method of broadcasting.

In the absence of a declaration by this Court in these proceedings concerning the constitutional rights of the riding public it seems likely that transit radio will continue in the other cities where it is now functioning and perhaps even expand into still other cities, operating as a correlated system of broadcasting to captive audiences of many millions, unless in other cities lawyers and citizens' organizations undertake the substantial burden of duplicating in large measure the effort which has been made in Washington over a period of nearly two years, in which event this Court is likely to be asked again to rule upon these issues.

D. There Is Substantial Authority in Support of Our Position on the Questions Presented.

1. As to the First Amendment.

On the interest of the public in freedom of communication: *Grosjean* v. *American Press Publishing Company*, 297 U. S. 233.

On the right of the prospective listener or reader to decide for himself whether or not he will read or listen: *Martin* v. *Struthers*, 319 U. S. 141; William Ernest Hocking, Freedom of the Press (1947) 161-2.

On the right of the radio listener under the First Amendment as superior to the right of the radio speaker under the First Amendment: *National Broadcasting Co.* v.

F. C. C., 47 F. Supp. 940 (D. C. N. Y. 1942), affirmed, 319 U. S. 190.

2. As to Liberty Under the Fifth Amendment.

Nothing need be added to the discussion in the opinion below (R. 124-131).

3. As to Property Under the Fifth Amendment.

United States v. *Causby*, 328 U. S. 256, held that where noise impaired the value of a building—among other ways, by interfering with the owner's sleep and damaging his health—there was a taking of property for which the Government was required by the Fifth Amendment to give compensation.

4. As to Personal Security, Liberty and Health.

The right of personal security and personal liberty includes a person's right to the "legal and uninterrupted enjoyment of his life, his limbs, his body [and] his health," and when the law guarantees to one the right to the enjoyment of his life, it gives him something more than the mere right to breathe and exist. 1 Blackstone's Commentaries, 129 *et seq.* The right of liberty which is guaranteed to every person by the Constitution also includes those "rights essential to the orderly pursuit of happiness by free men" (*Meyer* v. *Nebraska*, 262 U. S. 390), the "right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator" and "the right to be let alone". *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, 50 S. E. 68 (1904).

In No.

The cross writ of certiorari which we seek in No. .... should be issued so that if the writ is granted in No. 224 this Court, without any possible procedural obstacle, can consider the broadcasts as a whole—both music and textual

material—and can apply to the broadcasts as a whole—both music and textual material—the constitutional objections which we make against them.

As the petitioners in No. 224 correctly state in their petition (p. 4) the broadcast "consist primarily of music". At the time of the hearing the broadcasts were continuous from 7 a.m. to 7 p.m. They now continue until 10 p.m. The allegations which these respondents-petitioners made against the broadcasts in their petition of appeal in the District Court did not draw a distinction between music and words, and the record clearly shows that objections made by objecting riders have in many cases been based upon the broadcasts as a whole, without distinction between music and words, or have been directed specifically at the music (Opinion of the Public Utilities Commission, R. 114-120). The objections make it clear that the music as well as the words is itself a violation of the First Amendment through interfering with freedom to read and converse itself infringes liberty in violation of the Fifth Amendment by interfering with the free use of one's faculties and itself takes property in violation of the Fifth Amendment by interfering with the use of one's time and by endangering health.

Finally, forced listening devices disrupt and endanger the "American System of Broadcasting" and is thus a matter of national concern.

The United States of America has a unique system of broadcasting supported by commercial advertising. Currently, the industry is on the threshold of a tremendous expansion into television. Already there are 13,000,000 television receivers in use. Color television is in the offing. Proposals to convert television broadcasting into a form quite different from that which has prevailed in aural broadcasting are being discussed. Wired television, subscription television, pay-as-you-look phonevision, theater television, each has its advocates. Advertising revenue, apparatus sales and the correlated industrial applications have grown to a point where billions of dollars are involved.

Transit radio alone excepted, this whole vast structure, with all its social and economic impacts, derives its vital force from the principle that the listener or viewer shall have the absolute and unrestricted right to elect whether or not his receiver shall be placed in operation and if so, to what station it shall be tuned. Unless the listener or viewer is completely free to select what he wishes to hear or see in a freely competitive field, the American system of broadcasting is deprived of its vigor and becomes a sinister, formless thing.

Cast and direction must, as an administrative matter, be given to the development of television by the appropriate regulatory authority. That is not a judicial function. It is, however, essential that the administrative function be exercised in conformity with law. The importance of a decision by the Supreme Court of the United States at this stage affirming the inviolable right of the public to select its broadcast programs is self evident.

CONCLUSION.

For the foregoing reasons, in the event that a petition for writ of certiorari is granted in No. 224, it is respectfully requested that the writ issue in No.

Respectfully submitted,

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